

EXHIBIT 5

on.iffany M. artwright

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F R E E ERN DI RI F A IN N
A A MA

ANN LED , a single woman.

laintiffs,

v.

LIER , IN . d b a E I , E I
N R I , FIND MY F RM LA, and
F RM LA , a Delaware orporation
DANIEL FREED, individually MA
R IN, individually RAND
N RA E I AL , IN . d b a RAND
N RA , a New York orporation RAND
A A IN R , IN . d b a RAND
N RA E I AL , a New York
orporation and ohn and ane Does l .
Defendants.

Defendants.

No. 3:24 cv 0 0 M

**THESIS DEFENDANTS'
SECOND MOTION TO
COMPEL ARBITRATION**

N E NM I N ALENDAR:
April 1 , 202

INTRODUCTION

Defendants utliers, Inc. hesis , Daniel Freed, and Matthew Rubin collectively,
thesis Defendants renew their motion to compel arbitration. he ourt should grant the
motion and send laintiff oann LeDou s claims against them to arbitration for the following
reasons:

- When LeDou bought her Hesis subscription, Hesis's website required customers to accept certain terms and conditions by clicking a check box before making a purchase.
- The terms governed customers' use of Hesis's website and services and applied to all product purchases.
- The terms mandate arbitration of any controversy or claim arising out of or relating to this contract, or breach thereof.
- LeDou bought a monthly subscription of Hesis products from Hesis's website and made at least eight purchases of Hesis's products.
- By doing so, LeDou had to affirmatively accept Hesis's terms, meaning that she agreed to arbitrate disputes arising from her subscription purchase.
- LeDou's claims against the Hesis Defendants fall within the arbitration agreement's broad scope, as they flow from her use of Hesis's website and online transactions.
- Freed and Rubin may invoke the arbitration agreement pursuant to agency and estoppel principles.¹

Because LeDou agreed to arbitration, the court should enforce that agreement and compel arbitration.

BACKGROUND²

A. Factual Background

Hesis sells nootropic supplements designed to support cognitive health. In March 2021, customers could buy Hesis's products online at <https://findmyformula.com>. *See* Declaration of Daniel Freed (Freed Decl.), . At that time, Hesis used Arthook Inc.'s web-based checkout technology to process online orders. *Id.* . Hesis's checkout page displayed a prominent purchase button. *Id.* *see also*, Declaration of Maranda Lujajohnson (Lujajohnson Decl.) *cf.* Declaration of Ameer Anand (Anand Decl.).

¹ In addition to requesting to compel arbitration, the Hesis Defendants have also moved to dismiss under Federal Rules of Civil Procedure 12(b)(2) and 12(b)(7). For purposes of judicial economy, the Hesis Defendants respectfully request that the court consider first the arguments made in the motion to dismiss about personal jurisdiction, second this motion to compel arbitration, and finally the remainder of the motion to dismiss.

² This motion adds all emphasis and omits internal quotation marks and citations in quoted materials unless otherwise indicated.

stating that the same button existed on hesis's checkout page in July 2021. A check box was located just above the purchase button. Freed Decl., Lujajohnson Decl., . The check box was followed by text to the effect of: I have read and agree to the terms and conditions and Medical Disclaimer. Freed Decl., Lujajohnson Decl., . The terms were hyperlinked to that text. Freed Decl., Lujajohnson Decl., . By clicking the hyperlink, a customer could view the terms entire text before clicking the purchase button. Freed Decl., Lujajohnson Decl., . It was not possible to purchase a subscription of hesis products on hesis's website unless the customer first clicked the check box agreeing to the terms before pressing the purchase button. *See* Lujajohnson Decl., *cf.* Anand Decl., , 11 same, up to July 2021. Indeed, the purchase option was grayed out, so the checkout could not proceed unless the customer first affirmatively checked the box agreeing to hesis's terms. Lujajohnson Decl., . hesis removed the check box from its checkout page after July 2021, *see* Anand Decl., 10, underscoring its presence in March 2021, when LeDou purchased her subscription, Lujajohnson Decl., .

The terms which relate to customers use of hesis's websites and services, as well as their purchases of hesis's products constitute a binding written agreement between hesis and the customer clicking the check box. *See* Freed Decl., E . A at 1. Relevant here, the terms mandate binding arbitration . . . in the Southern District of New York for any controversy or claim arising out of or relating to this contract, or breach thereof :

DISPUTE RESOLUTION AND CHOICE OF LAW

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by binding arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules. The arbitration hearing shall take place in the Southern District of New York, before a single arbitrator. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Further, you agree that any issue or dispute arising out of or in connection with your use of our site, intellectual property, the terms, or any matter

concerning company shall be governed by the laws of the United States and the State of New York with venue in the Southern District of New York.

Id. at .

LeDou is an Army nurse who was stationed in Washington during 2021, Dkt. 3 at 3. She bought a subscription of Hesis products from Hesis's website in March of that year, e.g., Dkt. 4. ANN LED decided to purchase a subscription from E I for her supposedly individualized packets of Formula Nootropic supplements. Dkt. 2 at , . LeDou allegedly consumed the Hesis products that she ordered.

That fall, during a routine Army drug screening, LeDou tested positive for amphetamines. *Id.* She was court-martialed but ultimately acquitted. Dkt. 4 at 131. Still, LeDou alleges that the Army is administratively separating her from military service. *Id.* . She blames Defendants for her Army and personal difficulties.

B. Procedural History

LeDou sued. Dkt. 1. She asserts negligence, unfair trade practices, failure to warn, design and manufacturing defect, breach of warranty, and misrepresentation and fraud. Dkt. 4 at 144-1. She named Nutra Defendants alleged manufacturers of the supplements at issue moved to dismiss, Dkt. 24, while the Hesis Defendants moved to compel arbitration, Dkt. 14.

The court granted the motion to dismiss in part and denied the motion to compel arbitration without prejudice. Dkt. 3 at 33 *LeDoux v. Outliers, Inc.*, 2023 WL 230 .D.

ash. Feb. 1, 2023. In denying arbitration, the court concluded that the Hesis Defendants had not shown that it was more likely than not that LeDou clicked a box assenting to Hesis's terms. Dkt. 3 at 1. The court also discounted an affidavit that the Hesis Defendants submitted with their reply but authorized them to reurge arbitration. *Id.* at 1, 20-21.

The Hesis Defendants now file this second motion to compel arbitration and respectfully ask the court to compel arbitration in accordance with Hesis's terms.

LEGAL STANDARD

Under the Federal Arbitration Act, a party seeking to compel arbitration has the burden to show (1) the existence of a valid, written agreement to arbitrate and, if it exists, (2) that the agreement to arbitrate encompasses the dispute at issue. *Showalter v. Apartment Mgmt. Consultants, LLC*, 4 F. App. 3d 122, at 2 (D. Wash. Ct. 24, 2024) (artwright, . . .

As to the former, the court must make the threshold determination that a valid contract was formed before ordering arbitration. *Id.* Courts apply state contract law to determine whether the parties formed a valid agreement to arbitrate. *Id.* Either New York or Washington law applies. *LeDoux*, 2024 L 23 0, at . But because there is no conflict in those states' laws regarding contract formation, *Bennett v. T-Mobile USA, Inc.*, 2024 L 22 0, at (D. Wash. Jan. 22, 2024), the *hesis* Defendants proceed under Washington law. As the parties seeking to compel arbitration, the *hesis* Defendants bear the burden of proving the existence of the arbitration agreement by a preponderance of the evidence. *LeDoux*, 2024 L 23 0, at .

As to the second inquiry, federal substantive law governs the scope of an arbitration agreement. *Shivkov v. Artex Risk Sols., Inc.*, 4 F.3d 101, 10 (th Cir. 2020). If a contract contains an arbitration clause, there is a presumption that the dispute is arbitrable. *Lagrone v. Advanced Call Ctr. Techs., LLC*, 2014 L 4 3, at 4 (D. Wash. Ct. 2, 2014). In that case, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Id.* The complaint's factual allegations guide the analysis. *Simula, Inc. v. Autoliv, Inc.*, 1 F.3d 1, 21 (th Cir. 1). Then, as here, the arbitration agreement is broad, the factual allegations need only touch matters covered by the arbitration agreement. *Id.*

ARGUMENT

A. LeDoux necessarily clicked the check box, forming a binding arbitration agreement.

A website operator's terms of use are an enforceable contract if: 1 the website provides reasonably conspicuous notice of the terms to which the consumer will be bound and 2 the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms. *LeDoux*, 202 L 23 0 , at quoting *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 4 , th ir. 2022 .

he court correctly identified the second prong as the center of this dispute, *LeDoux*, 202 L 23 0 , at , and on that point, the facts are straightforward:

- LeDoux bought a subscription of Thesis's products online in March 2021. *E.g.*, Dkt. 2 at Dkt. 4 0.
- At that time, completing a purchase required checking a box agreeing to Thesis's terms. *See* Lujajohnson Decl. .
- That is, in March 2021, it was impossible for a customer to purchase a Thesis subscription without having first checked the box at issue. *Id.* *cf.* Anand Decl. 11 same for July 2021 until Thesis removed the check box .

Thus, LeDoux had to and did click a box agreeing to Thesis's terms, which included binding arbitration. *See* Lujajohnson Decl., E . A at .

As for notice, the check box was prominently placed above the grayed out purchase button. *Freed Decl.*, Lujajohnson Decl., . The accompanying text made clear that the customer had read and agreed to the terms, which were linked for easy access. *Freed Decl.*, Lujajohnson Decl., .

Accordingly, LeDoux assented to Thesis's terms and had reasonable notice of them. The court should therefore hold that the terms are an enforceable contract between LeDoux and Thesis.

B. Defendants Freed and Rubin may enforce the arbitration agreement under agency and estoppel principles.

A litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement. *All for Kidz, Inc. v. Around the World Yoyo Entm't Co.*, 2014 L 1 0 21, at 2 .D. ash. May , 2014 . Under Washington law, employee defendants sued for acts within the scope of their employment may defensively invoke their employer's agreement to arbitrate disputes encompassing those acts. *Id.*

Here, LeDou's complaint treats Freed, Rubin, and Thesis as a single entity. *See, e.g.*, Dkt. 4 at 20 . The E I DEFENDANT misrepresented that the product has no serious adverse health effects in their branding and marketing. . LeDou thus fails to allege a single relevant fact specific to either individual.³ The only conclusion, then, is that whatever Freed and Rubin allegedly did which, again, is unclear due to the complaint's improper group pleading,⁴ they did within the scope of their agency. bolstering that conclusion is the absence of any allegations that either Freed or Rubin acted in a personal and not a Thesis capacity. As a result, both individuals may invoke the arbitration agreement as Thesis agents. *All for Kidz*, at 2 4 *see also Letizia v. Prudential Bache Secs., Inc.*, 02 F.2d 11 , 11 th Cir. 1 federal law .

Freed and Rubin are likewise entitled to enforce the arbitration agreement pursuant to equitable estoppel. Under that doctrine, a nonsignatory may enforce an arbitration agreement when: 1 the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory, and 2 the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying

³ LeDou alleges that she was deceived and not warned about the product, which she also alleges was negligently designed and negligently manufactured. None of the few facts that LeDou alleges about Freed and Rubin relate to those issues. Dkt. 4 at 2 2 complaining about Freed and Rubin's court martial testimony, which took place long after the facts underlying her claims .

⁴ Because of LeDou's group pleading, nothing in the complaint suggests that Freed or Rubin knew of, personally participated in, or otherwise had any involvement in the alleged misconduct.

agreement. *Schmidt v. Samsung Elecs. Am., Inc.*, 201 L 22 03 , at .D. ash. May 2 , 201 collecting cases *cf. McLeod v. Ford Motor Co.*, 200 L 3 33 4, at 4 .D. al. Apr. 14, 200 hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement. federal law . Again, LeDou repeatedly treats Freed and Rubin as interchangeable with hesis, satisfying the test s first prong. he second prong is also met because LeDou s claims arise from her use of hesis s website, which is governed by the contract containing the arbitration agreement. *E.g.*, Dkt. 4 at 23 LeDou alleging that she bought hesis products from the hesis website, and that she did so after taking an online ui located on the website *id.* at 24 LeDou alleging that at least one of the packets contained ingredients that were not disclosed on E I s website which advertised the list of ingredients in its product . Moreover, the erms disclaim warranties, caution against relying on product descriptions, and warn that information on hesis s website is for informational use only and should not be construed as medical advice provisions that go to the merits of LeDou s claims.

he ourt should authori e Freed and Rubin to enforce the arbitration agreement.

C. LeDoux's claims fall squarely within the arbitration agreement's broad scope.

he arbitration provision encompasses a ny controversy or claim arising out of or relating to this contract the erms , or the breach thereof. *See* Freed Decl., E . A at . he erms relate to LeDou s use of hesis s website, as well as her purchases of hesis s products, *id.* at 1 and all of her claims flow from those events, *e.g.*, Dkt. 4 1, 0, , 12 . At the very least, LeDou s factual allegations touch matters covered by the arbitration agreement, entitling the hesis Defendants to arbitrate all of LeDou s claims.

CONCLUSION

The court should: 1 grant the thesis Defendants motion, 2 compel LeDou s claims against them to arbitration, and 3 stay this case pending arbitration.

The undersigned counsel certify that this memorandum contains 2,413 words, in compliance with the Local Civil Rules.

DA ED: March 1 , 202 .

MURPHY BALL STRATTON LLP

y: /s/ Richard Houghton
 Richard oughthon ar No. 24121
 admitted *pro hac vice*
 Michelle tratton ar No. 240 0
 admitted *pro hac vice*
 hristian Mc uire ar No. 3 334
 admitted *pro hac vice*
 1001 Fannin treet, uite 20
 ouston, e as 002
 hone: 13 4
 mstratton mbssmartlaw.com
 rhoughton mbssmartlaw.com
 cmcguire mbssmartlaw.com

ARETE LAW GROUP PLLC

y: /s/ Jeremy Roller
 eremy E. Roller, A No. 32021
 00 niversity treet, uite 2420
 eattle, A 101
 hone: 20 42 32 0
 Fa : 20 42 32 1
 jroller aretelaw.com

*Attorneys for Defendants Outliers, Inc.,
 Daniel Freed, and Matt Rubin*